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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

SEACOAST COIN, INC. et al.,

Defendants.

Case No. SC122066

PLAINTIFF'S TRIAL BRIEF

Date: June 8, 2015
Time: 10:00 a.m.
Dept.: N
Judge: Hon. Craig D. Karlan

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INTRODUCTION

The U.S. precious metals industry is unregulated. It requires no licensing or bonding and no laws govern it. Yet it has become a popular investment vehicle for many Americans, who invest large portions of their life savings in gold and silver coins. National retailers charge far above market value for these coins and subject consumers to unscrupulous sales practices. The result is an industry where misleading boiler-room tactics are the norm, and consumers are suffering.

In 2009 Merit Financial was a medium-sized coin dealer in Santa Monica. The spot price of gold was soaring, while the U.S. economy was reeling. Competitors such as Goldline and Lear were capitalizing on these conditions, advertising on national television and making fortunes by tricking consumers into buying "semi-numismatic" coins at greatly inflated prices. In response, Merit's new vice president Michael Getlin and owner Peter Epstein came up with a radical plan to gain market share: They would advertise all gold and silver bullion at one percent over dealer cost, an irresistible deal that Epstein confirms was the best price for gold in the U.S.

In early 2010, Getlin and Epstein wrote and approved a new 60-second ad for television called "Unstable Economy." [Exhibit 78.] It begins with an actor's menacing voice warning of an "unstable economy and massive government deficits." He says that with that instability, "investors" are "flocking to gold and silver." Then he delivers Merit's new offer, good "for a limited time," of their "most popular coins and bullion at one percent over dealer cost." The ad concludes that Merit's "expert staff" is standing by to take calls.

The 1% ads lured hundreds of thousands of consumers to call Merit. The company exploded in size and grossed more than $1 billion in sales over the next five years. However, most of those sales were not of the touted bullion at one percent over cost. Instead, over 60 percent of Merit's sales – some $640 million – were converted from bullion to far more expensive non-bullion coins.

For the switch, Getlin and Epstein rewrote Merit's brochures that were sent to customers who called after seeing the ad. This included blatantly false statements disparaging bullion, the very product urgently recommended in the ad, including saying that bullion violated Merit's "Three P's": profit, protection and privacy, the "three crucial benefits to owning gold." Thus, when consumers called Merit after seeing "Unstable Economy" or one of the many other 1% bullion ads in the years

to come, they were greeted by a company whose practices bucked violently against the very product featured in its own national ad.

The switch was also radical in scale: rather than 1% over cost, Merits' profit on non-bullion coins was between *23 and 43 percent* over cost. [*See* Exhibit A, attached hereto.] This markup was well concealed; many non-bullion consumers thought they were still getting the one-percent deal.

THE FACTS

A. Merit's Sales Model

The typical Merit transaction started with customers calling in, eager to buy bullion at one percent over cost. The goal always was to switch them to non-bullion. The first line of attack was to make the switch right away. If that failed, salespeople (known as Account Executives, or AEs) were trained to "get the money in." This meant ostensibly agreeing to the customer's bullion request, having them wire in the money; and then aggressively pushing for non-bullion once the funds were in and the company had more leverage. If AEs were unable to switch a customer, they were trained to do a "T.O.," or turn-over, to one of the "senior" account executives who would usually wear down the customer (often after many hours of talking) and succeed in making the switch.

B. Merit's Switching Tactics

Merit employed many different tactics to switch, or "flip," consumers from bullion to non-bullion, both through the AEs' sales talks and official company brochures. These included:

1. "Non-confiscatable"

Consumers were told bullion could be "confiscated" by the government, while non-bullion could not. The ploy is allegedly based on President Roosevelt's 1933 Executive Order under which most gold owned by U.S. citizens was recalled by the government, which paid fair market value in return. There are many reasons why this tactic is false and misleading in modern times, including that there is no current law under which the government can recall gold; there is no way to guarantee that any product is immune from a theoretical future recall; and the 1933 recall was not a "confiscation" at all, since gold owners were paid market value for their gold.[1]

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[1] The People request judicial notice that the word "confiscate" denotes taking property without paying the owner for it. *See Black's Law Dictionary* p. 271 (5th ed.1979) ("confiscation" is

2. "Non-reportable"

Another common ruse was to claim that the coins were "non-reportable," while bullion was "reportable." Getlin and Epstein personally revised Merit's brochure to say this. The implication was that consumers would not have to pay taxes on capital gains, a plain falsehood. To the extent the claim was clarified, it was still false. Its purported source was IRS Revenue Procedure 92-103, which tells coin dealers to issue Form 1099-Bs when customers sell back large quantities of certain bullion products. However, many bullion products *do not* require the 1099 form. Hence it is false to imply that all bullion is "reportable," even in this limited sense. [*See* Exhibit 1028.]

3. "Better Investment."

The most insidious of Merit's false claims was that non-bullion was a better investment than bullion and that it would reap consumers more profits than bullion. This was virtually impossible, given Merit's lopsided pricing of the two products. As illustrated in Exhibit A (attached here), a given non-bullion coin would have to appreciate in value exponentially greater *than the spot price of gold*, to out-perform bullion. Far from innocent puffery, this claim was downright fraud.

C. The People's Evidence Will Confirm That Merit's Switching Tactics Were The Company's Systematic Business Model.

1. Testimony of former salespeople.

Former AEs will confirm the details and universal nature of Merit's anti-bullion switch; that Epstein and Getlin knew of and fully condoned these tactics; and the pervasive and constant pressure on the AEs to sell non-bullion and discourage bullion.

2. Testimony of former customers.

Victims whose deals with Merit illustrate the wrongful tactics in this case will testify.

3. Merit's written brochures.

Merit's promotional materials (written by the defendants) were sent out to prospective and actual customers by the thousands. They featured the same wrongful tactics. For example:

"[t]he seizure of private property by the government without compensation to the owner").

- "Modern bullion may be reportable on your tax return, and has been confiscated in the past by many governments, including our own."
- "Unlike gold bullion[, non-bullion coins] are usually not reportable on your tax return."
- The "private" [i.e., non-bullion] coins "generally provide[] the most gold for your money in a non-reportable non-confiscatable form." [*See* Exhibits 72, 104, 116]

4. Training of salespeople.

Defendant Getlin personally trained all of Merit's salespeople to promote non-bullion and disparage bullion. In any case, most of the training was unnecessary. Getlin concedes that the "vast majority" of his AEs came to Merit from other coin companies already steeped in the culture of using "confiscation" and "reportability" to push non-bullion.

5. The People's undercover calls.

In March 2013, the People's investigator called Merit posing as a customer looking to spend $100,000 on a gold IRA. She was transferred to Ramtin Ghaneeian, one of Merit's top salesmen. Over the course of three calls, Ghaneeian recited a litany of false anti-bullion, pro-coin statements. These random calls provide rare inside evidence of actual sales discussions at Merit. (Although Merit recorded many of its sales calls, none were available by the time of discovery.)

6. Merit's sales numbers.

The pervasiveness of Merit's switching tactics is graphically shown by the bottom-line numbers. For a four-year period included in the statutory window for this case, Merit totaled $1.08 billion in gross precious metal sales.[2] Of those sales, $641 million – or 60 percent – were for non-bullion, despite the huge proportion of customers calling Merit to buy bullion after seeing the 1% ads. However, the disparity between these two categories is far greater than the raw numbers suggest. Merit's profits from bullion (1% of $439 million, or $4 million) were dwarfed by its non-bullion profits (conservatively estimated at a markup of 25% on the $641 million in non-bullion sales, or $160 million). Thus, *over 97% of Merit's gross profits came from non-bullion sales.*

7. AE financial incentives.

Merit's AEs were on straight commission. Non-bullion sales netted them 5 to 10 percent

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[2] The UCL's four-year statute of limitation was extended by the parties' tolling agreement. It is agreed that the statutory period in this case runs from September 26, 2009 until August 5, 2014.

commission, while bullion sales brought only 0.5 percent. On a customer spending $50,000, an AE faced the options of a non-bullion commission of up to $5,000, versus a bullion commission of $250. (*See* Exhibit A, attached.) Defendants bolstered this incentive with bonuses based completely on commission (and thus on non-bullion sales); monthly commission minimums; and annual contests.

8. Epstein's and Getlin's own testimony.

The co-defendants conceded at their depositions that they employed and condoned most of the practices described above. They were fully aware of the AEs' practices throughout the five-year period, and they used a variety of oversight to keep a close eye on them – including random eavesdropping on sales calls; recording and re-playing calls; and frequently walking the floor and listening to the AEs on the phones. Getlin personally conducted both initial training and daily "morning meetings" with AEs. In short, what the AEs did, the defendants knew of and approved.

9. Candid emails and notes of salespeople.

Defendants and their AEs were careful not to leave paper trails of their unlawful practices in individual customer transactions. However, some telling examples survived.

Defendants will claim that they made rules and punished the worst of the AEs' switching tactics. Yet their entire business model *depended on* these same tactics. To the extent Merit had sales rules, they were rarely enforced – and only when an AE's tactics were so outrageous as to risk liability for the company. Not until the People's criminal prosecution of Goldline in November 2011, did Merit even purport to curb any switching tactics. Even after that, the company's reliance on bait and switch with fraudulent tactics continued unabated, with no meaningful enforcement.

THE LAW

A. The UCL And FAL Are Broadly Construed To Protect The Public From Unscrupulous Businesses Like Merit.

The People bring this case under the Unfair Competition Law ("UCL"), Business and Professions Code section 17200, and the False Advertising Law ("FAL"), Business and Professions Code section 17500. These laws are broadly construed to protect the public. The UCL "was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive." *Cel-Tech*

Comm's, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180. The overriding purpose of these laws is to protect "unwary consumers from being duped by unscrupulous sellers," an "exigency of the utmost priority m contemporary society." *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 808. Industry-wide noncompliance with the law is also no defense. *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 528-29.

B. Defendants used unlawful "bait" advertising.

Violations of federal advertising rules constitute "unlawful" practices which trigger liability under the UCL. *See People ex rel. Mosk v. National Research Co.* (1962) 201 Cal.App.2d 765, 772–73; *O'Conner v. Superior Court* (1986) 177 Cal.App.3d 1013, 1018.

The legal standard for unlawful bait and switch is found in the Federal Trade Commission's advertising regulations. The FTC defines improper "bait" advertising as

> "an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. Its purpose is to switch consumers from buying the advertised merchandise, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser." 16 C.F.R. §238.0.

The federal rules provide two examples of illegal bait ads that apply here:

Disparaging advertised product. "No act or practice should be engaged in by an advertiser to discourage the purchase of the advertised merchandise as part of a bait scheme to sell other merchandise. . . . The disparagement by acts or words of the advertised product" is evidence that the original offer was not bona fide. 16 C.F.R. §§238.3, 238.4(c).

Salesperson incentives to discourage sale of advertised product. It is evidence of illicit bait advertising to use "a sales plan or method of compensation for salesmen or penalizing salesmen, designed to prevent *or discourage* them from selling the advertised product." 16 C.F.R. §238.3(f). (Emphasis added.)

Merit's one percent bullion advertising was a textbook example of unlawful bait advertising. The defendants violated both of the FTC rules that define the practice (disparaging bullion and creating strong incentives for AEs to discourage it), on a systematic basis.[3]

[3] It is no defense to the charge of unlawful bait and switch that Merit sold a substantial

C. Defendants violated the FAL and the UCL with false and misleading sales tactics.

The UCL and FAL ban overtly false ads as well as advertising which, even if true, is misleading or "has a capacity, likelihood, or tendency to deceive or confuse the public." *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 951. Proof of actual deception, reasonable reliance, and damage are unnecessary. *See, e.g., Chern v. Bank of America* (1976) 15 Cal.3d 866, 876.

Thus, even if there were no bait and switch in this case, the defendants' sales tactics were themselves false and therefore violated the FAL and UCL. Also, even without this falsehood, each of defendants' switch tactics was at least misleading under the FAL standard.

DEFENDANTS' VIOLATIONS WARRANT RESTITUTION AND CIVIL PENALTIES

A. The Court Should Order Full Restitution To All Eligible Customers.

Restitution under the UCL and FAL meets the public goals both of recompense to consumers and of deterrence. Bus. & Prof. Code §§17203, 17535. In public prosecutor actions, "restitution may have a collateral law enforcement effect" by punishing the wrongdoer. *State of California v. Altus Finance* (2005) 36 Cal.4th 1284, 1305; *see also Fletcher v. Security Pacific Nat'l Bank* (1979) 23 Cal.3d 442, 451 (restitution necessary to "effectuate the full deterrent force" of UCL).

Restitution under the UCL and FAL may be ordered without individualized proof of harm. *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 326; *People v. JTH Tax, Inc.* (2013) 212 Cal.App.4th 1219, 1255. The UCL and FAL state that the court "may make such orders or judgments … as may be necessary to restore any person in interest any money property, real or personal, which *may have been acquired* by means of such unfair competition." Bus. & Prof. Code §§17205, 17535 (emphasis added). This language has been liberally interpreted to allow courts to order restitution without the plaintiff having to prove that individual consumers were actually deceived, relied upon the fraudulent practice, or sustained any damage. *See People v. Sarpas* (2014) 225 Cal. App. 4th 1539, 1548 (class-wide restitution ordered based on testimony of six victims).

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amount of bullion. Sale of an advertised product is often "a mere incidental byproduct of the fundamental [bait and switch] plan and is intended to provide an aura of legitimacy to the overall operation." Note to 16 C.F.R. §238.4. The figure of 40 percent might at first appear more than incidental. However, as noted above, less than 3 percent of Merit's profits came from bullion sales.

The People recognize that two factors make it difficult to monetize the precise losses of Merit's thousands of customers who were misled into buying non-bullion. First, Merit has gone out of business, so customers cannot return the coins and get their money back. Second, the coins' values fluctuate, making precise valuations difficult. These facts, however, do not relieve defendants of their liability. Customers who were switched to non-bullion coins paid between 23 and 43 percent over cost, as opposed to the advertised 1percent. The Court should exercise its broad authority under the UCL to fashion a restitution order that requires defendants to make their customers whole. The People will propose a restitution program that requires customers to opt in and confirm the requisite violations; and that uses a simple, conservative formula for quantifying the losses.

B. Civil Penalties Under The UCL And FAL Are Mandatory, And The Circumstances Require That They Be Substantial.

In a UCL case, the Court must impose a penalty for each violation proven under each cause of action. *People v. Orange County Charitable Services* (1999) 73 Cal. App.4th 1054, 1071. The maximum combined per-violation penalty is $5,000.00 for violations of the UCL and the FAL, which are cumulative. *See* Bus. & Prof. Code §§17205, 17534.5. In calculating the appropriate amount of penalty for each violation, Business and Professions Code sections 17206(b) and 17536(b) instruct the courts to consider six factors:

1. The nature and seriousness of the misconduct

The defendants' unlawful practices were conducted under the guise of providing advice to thousands of Americans looking to maximize their investments. Many of Merit's customers converted their IRAs to overpriced "proof" coins, instantly losing much of their life savings. The serious nature of these violations and their financial harm to consumers was tremendous.

2. The number of violations

Every person solicited by a deceptive advertisement or other act of unfair competition constitutes a separate violation. *See People v. Superior Court (Jayhill Corporation)* (1973) 9 Cal. 3d 283. In addition, where (as here) misleading advertisements were transmitted to large numbers of consumers, the courts have employed a cumulative approach in calculating the total number of violations. This includes a separate violation counted for each person who (a) viewed each ad, (b)

inquired about an ad, or (c) paid the business based on an ad. *See People v. JTH Tax, Inc.* (2013) 212 Cal.App.4th 1219, 1251; *People v. Superior Court (Olson)* (1979) 96 Cal.App.3d 181, 198. Using the above formula reveals extremely high numbers of violations in this case.

(a) **Total ad views.** The People's expert William Formeca will testify to Merit's total advertising views (television and online) using Merit's records and the widely recognized Nielsen Ratings data.[4] Formeca's conclusion is that Merit's 1% Over Dealer Cost TV ads were viewed more than 1.2 billion times.

(b) **Number of customers who contacted Merit after seeing ads.** The most detailed data relating to numbers of customers who contacted Merit after viewing its advertising is contained in Merit's annual "Lead Reports," which are broken down by month. These reports reflect a total of 266,189 customer leads obtained during the period 2010 through early 2014.

(c) **Number of customers who bought non-bullion from Merit after wrongful ads or sales tactics.** Merit had at least 20,000 customers during the period who bought non-bullion after either viewing the one-percent bullion ads, or being subjected to wrongful sales tactics.

3. The persistence of the misconduct

The "persistence" of the misconduct refers to the continuation of wrongful practices after a business has received notice that it is in violation of the law. The defendants continued their unlawful practices throughout the statutory period, despite learning about the People's prosecution of two other coin companies for similar sales tactics as far back as December 2010. In any case, the

[4] The People request that the Court take judicial notice of the fact that the measurement systems used by the Nielsen Company to determine audience size and composition of television programming in the U.S. are widely recognized as the primary source of such information in the industry. Thus, Nielsen ratings are recognized by courts as the industry standard. *See People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2004) 116 Cal. App.4th 1253, 1271; *see also People v. JTH Tax Inc.* (2013) 212 Cal. App. 4th 1219, 1254 (citing the People's current expert and finding "no reason why the Court could not reasonably rely on Formeca's testimony regarding Nielson ratings, and based on our review of his testimony, we conclude that it could").

People put Merit formally on notice of its violations on September 26, 2013. Despite this notice, Merit continued to perpetuate the same misconduct on its customers for nearly *one additional year*.

4. The length of the time over which the misconduct occurred

The misconduct in this case occurred throughout the entire five-year period.

5. The willfulness of defendant's misconduct

Merit's entire operation, including the bait and switch scheme and all of the fraudulent sales tactics, was consciously designed to switch and mislead consumers.

6. The defendants' assets, liabilities, and net worth

Penalties in a UCL case must be sufficient to adequately punish, and prohibitively expensive. As the court stated in *People v. Superior Court (Kardon)* (1973) 35 Cal.App.3d 710, 713: "A relatively small penalty might suffice for the small operator, while the same penalty would be paid with little hurt by the wealthy one." Both Epstein and Getlin have substantial assets and net worth; and both men netted enormous profits from Merit's fraudulent operation.

Taking the six civil penalties factors into account reveals both an extremely high number of violations, and also a high per-violation penalty on the $0 - $5,000.00 scale.

C. Defendants Are Jointly And Severally Liable.

Epstein and Getlin were the only owners of Merit. They devised and ran all aspects of the operation including bait advertising, training, monitoring, compensation, and pricing. They alone reaped the tremendous profits from Merit's misleading practices. Moreover, they were always in a position to oversee and control all of the company's operations. Therefore, by law, they are each jointly and severally liable for all of the violations in this case. *See People v. First Federal Credit Corp.* (2002) 104 Cal.App.4th 721, 734. *See also People v. Conway* (1974) 42 Cal.App.3d 875, 885; *Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 360-61.

Dated: June 3, 2015

MARSHA JONES MOUTRIE
Santa Monica City Attorney

by ______________________
ADAM RADINSKY
Deputy City Attorney

Attorneys for Plaintiff
PEOPLE OF THE STATE OF CALIFORNIA

EXHIBIT A

The following table illustrates Merit's pricing for bullion and its three main categories of non-bullion coins (semi-numismatic, proof, and numismatic). It is based on a sample consumer who spends $50,000 on gold as an investment. It uses the pricing and markup system conceded by the defendants.

TOTAL SPENT: $50,000

Product	***Merit's est. cost***	***"Bid" price*** ***(cost + 7.5%)***	***"Spread" bid to ask***	***"Ask" price***	***Merit's profit*** ***(cost to ask)***	***AE's commission*** ***(on $50,000 sale)***	***Extra amount spent for non-bullion***
Bullion bar	$49,505	N/A	N/A	50,000	1% ($495)	0.5% ($250)	N/A
Semi-numis. Coins	$40,650	43,699	14.4%	50,000	23% ($9,350)	5% ($2,500)	$8,855
Proof coins	$37,313	40,111	24.7%	50,000	34% ($12,687)	8% ($4,000)	$12,192
MS61+ coins "numismatic"	$34,965	37,587	33%	50,000	43% ($15,035)	10% ($5,000)	$14,540

Based on these figures, the fraud of the " better investment" claim is apparent given how much the non-bullion coins would have to appreciate *above the gold spot price* to make up their initial cost over that of bullion, as the following table shows:

(continued)

On the same $50,000 sale:

Product	***Difference between initial cost of bullion and of non-bullion***	***% increase in non-bullion "premium" <u>over spot price</u> needed to make up initial gap with bullion[5]***
Bullion	0	0
Semi-numis. coin	$8,855	22%
Proof coin	$12,192	33%
"Numismatic" coin	$14,540	42%

Given the historical fluctuations of the over-spot premiums for Merit's non-bullion coins, the odds of a consumer making up even the lowest of these gaps, in any given timeframe, are virtually nil.

[5] This is calculated based on dividing the extra cost of the non-bullion (the first column), by the initial value of the non-bullion coins (the first column in Table 1).

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. My business address is 1685 Main Street, Santa Monica, California 90401. I am over the age of eighteen years and not a party to the action in which this service is made.

On **June 3, 2015** served the document(s) described as **PLAINTIFF'S TRIAL BRIEF** on the interested parties in this action in the following manner:

Hon. Craig D. Karlan Los Angeles Superior Court Department N 1725 Main Street Santa Monica, CA 90401 samdeptn@lacourt.org	Ricardo P. Cestero, Esq. Greenberg Glusker Fields Claman & Machtinger LLP 1900 Avenue of the Stars, 21st Floor Los Angeles, CA 90067 rcestero@greenbergglusker.com

☒ **BY ELECTRONIC MAIL:** I personally served upon all parties the above-referenced documents via electronic mail to the e-mail addresses for those individuals noted to have e-mail addresses on this Proof of Service List.

☐ **BY MAIL:** I am "readily familiar" with this firm's practice for the collection and the processing of correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Santa Monica, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on **June 3, 2015** at Santa Monica, California.

☒ [State] I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

DEBORAH FREEMAN